89-1638

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MICHAEL EWING,

Petitioner,

vs.

CITYTRUST,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does the decision of the Court of Appeals blatantly ignore clear and well-established Connecticut case law cited to the Court of Appeals by petitioner in its Brief for the Court of Appeals (See Separate Appendix hereto, pp. A63 - A155) thus denying petitioner the due process of law guaranteed to him by the Fifth Amendment to the Constitution?

2. Does the decision of the Court of Appeals completely fail to address any of the issues briefed by the parties, both: (a) in affirming that part of the District Court's decision from which petitioner had appealed without any apparent consideration

whatsoever of any of the arguments made by petitioner in his Brief for the Court of Appeals; and (b) in overruling that part of the District Court's decision from which Citytrust had cross-appealed on grounds that were never advanced by Citytrust in its Brief for the Court of Appeals (See Separate Appendix hereto, pp. A156 - A199), thus denying petitioner the due process of law guaranteed to him by the Fifth Amendment to the Constitution?

3. Does the apparent failure of the Court of Appeals to even read the Briefs filed before it by either party amount to such a departure from the accepted and usual course of judicial proceedings as would call for an exercise of the Supreme Court's power of supervision?

LIST OF PARTIES

Plaintiff-appellant and cross appellee-Petitioner:

Michael Ewing
327 East Rustic Road
Santa Monica, California 90402

Defendant, appellee and cross-appellant:

Citytrust Company
Bridgeport, Connecticut

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1989

No. _____

MICHAEL EWING, Petitioner

V.

CITYTRUST

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Michael Ewing, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above entitled case on December 13, 1989, from which a timely motion for rehearing was made and denied on January 17, 1990.

OPINIONS BELOW

The December 13, 1989, opinion of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 892 F.2d 168 and is reprinted in the Separate Appendix to this Petition, pp. A1 - A12. The prior opinion of the United States District Court for the District of Connecticut, also reprinted in the Separate Appendix at pp. A13 - A62, was not reported.

JURISDICTION

The judgment of the Court of Appeals was issued as mandate on

January 26, 1990, after a timely filed Motion for Rehearing was denied on January 17, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V

No person shall ... be deprived of life, liberty, or property, without due process of law... "

STATEMENT OF THE CASES

A. THE FACT PATTERN

On June 16, 1986, petitioner brought the instant action in Federal District Court on the basis of

diversity jurisdiction pursuant to 28 U.S.C. §1332 against Citytrust alleging that the Bank breached the duty it owed to him in the administration of two estates and three trusts to balance the competing interests of successive beneficiaries. The estates in question were those of petitioner's grandmother, Myra Goldsmith Ewing, and his grandfather, George Ross MacKenzie Ewing. Citytrust and petitioner's father, Alexander Lunt Ewing, were co-executors of both estates. The trusts in question were a testamentary trust created by Myra, of which Citytrust was the sole trustee, a

testamentary trust created by George, of which Citytrust was co-trustee with Alexander, and an inter vivos trust created by George, of which Citytrust was the sole trustee.

Myra died on January 22, 1967, and George died on June 3, 1967, leaving a single child, Alexander, and a single grandchild, the petitioner herein. Myra's testamentary trust provided very simply that all income should go to Alexander and that the remainder should go to petitioner upon Alexander's death. There was no provision permitting the trustee to invade the principal and there was no provision expressly directing or permitting Citytrust to make investments to maximize income for Alexander without

regard to petitioner's remainder interest. Citytrust, as co-executor with Alexander and as sole trustee, was given the power "[t]o invest and reinvest without restriction or limitation" and to hold and retain those assets with which she died seized "whether or not the same shall be an investment of the character deemed to be legal and proper for Trust investments under the laws of the State of Connecticut." Neither the District Court, the Court of Appeals nor Citytrust has cited any other provisions of Myra's Will as relevant to the instant case.

At her death, Myra had a diversified portfolio of blue-chip common stocks, all of which Citytrust

sold within two (2) months of her death, converting the entire proceeds thereof into municipal bonds for the sole purpose of maximizing income available for distribution to Alexander without any consideration of petitioner's competing interest as remainderman in preservation of the corpus. This course of action was pursued despite the fact that Citytrust knew and never denied knowing that Myra and George had left Alexander the aggregate sum of $2,169,198.00 outright on their deaths and despite the fact that Citytrust's own internal investment guidelines explicitly recognize the Bank's obligation under Connecticut law to balance the competing interests of successive

beneficiaries and call for an investment portfolio to be balanced between common stocks, bonds and other assets to comply with this requirement of law. Within the first year after Myra's death, Citytrust lost $103,577.34 in trading municipal bonds in her estate.

The value of Myra's residuary estate (which became the corpus of her testamentary trust) at her death in January, 1967, was $459,260.00. Due to Citytrust's admitted policy of making investments solely to maximize income for Alexander, there was no possibility of appreciation of the value of the corpus to keep up with inflation. As a result, the value of the corpus of Myra's testamentary trust at

Alexander's death in October, 1984, was only $472,259.16, in spite of inflation during that 17 year period amounting to 312%. Thus, the value of the corpus was effectively diminished by more than 2/3 during Citytrust's 17 year stewardship. None of the foregoing facts were even disputed by Citytrust, at any stage in the instant proceeding.

George's testamentary trust provided that the corporate trustee only (Citytrust) should distribute the income produced thereby to Alexander and petitioner "in such amounts and proportions as any said corporate Trustee in its sole and absolute discretion shall deem advisable from time to time without regard to equality of distribution." Upon Alexander's

death, the remainder of the corpus was to go one-half to petitioner and the remaining half was to stay in trust with the income going to petitioner's step-mother, Lynda Ewing, and the remainder on her death to her four children who were never legally adopted by Alexander. It also authorized Citytrust "to invade principal for any reason in its discretion for the benefit of [Alexander or Michael]". There is no provision expressly directing or permitting Citytrust to invest to maximize income without regard to the remainder interests. Citytrust and Alexander, as co-Trustees, was given the power "[t]o invest and reinvest without restirction or limitation" and to hold and retain

those assets with which he died seized "whether or not the same shall be an investment of the character deemed to be legal and proper for Trust investments under the laws of the State of Connecticut." Neither the District Court, the Court of Appeals nor Citytrust has cited any other provisions of George's Will as relevant to the instant case.

At his death George had a diversified portfolio of blue-chip common stocks all of which, precisely as it had done in the case of Myra's Estate, Citytrust sold within two (2) months after his death, again converting the entire proceeds thereof into municipal bonds, for the sole purpose of maximizing income for

Alexander, without regard for petitioner's interest as a remainderman, the substantial wealth Alexander inherited outright from George and Myra, and the Bank's own internal investment policy guidelines. The investment in municipal bonds precluded any possibility of appreciation of the corpus to keep up with inflation.

Although the Bank did not lose money in trading municipal bonds in George's Estate as it had in Myra's, George's residuary estate, which became the corpus of his testamentary trust, and which amounted to $283,492.00 on his death in June, 1967, had shrunk to only $111,000.00 by February, 1984, when the entire corpus was distributed

by Citytrust to Alexander. The Bank, as Trustee, invaded the principal of this Trust for the sole purpose (as set forth on the bank's own Invasion of Principal form) of enabling Alexander to continue to spend $5,000.00 per month for the next two years to support the four adult children of petitioner's step-mother, Lynda. None of the foregoing facts were ever disputed by Citytrust, at any stage in the proceedings below.

George's inter vivos trust was established on May 2, 1967, a month prior to his death, and was originally funded by IBM and Singer stock then valued at $1,487,445.60. It provided that Citytrust should "pay the income therefrom and so much of the principal

as may in the judgment of the Trustee be desirable to or for the benefit of the Grantor's son, ALEXANDER LUNT EWING, or Grantor's grandson, MICHAEL GEORGE EWING, in such amounts and proportions as my said corporate Trustee in its sole and absolute discretion shall deem advisable from time to time without regard for equality of distribution." Upon Alexander's death, the corpus was to be split between petitioner and his step-mother and her children, exactly as provided in George's testamentary trust. There was no provision expressly directing or permitting Citytrust to make investments to maximize income for Alexander without regard to petitioner's remainder

interests. Citytrust was given the power as Trustee "[t]o invest and reinvest in any property or security (including without limitation both common and preferred stocks) which it shall select," and "to make, retain or change any investment without liability or account thereof." Neither the District Court, the Court of Appeals nor Citytrust has cited any other provisions of George's inter vivos trust as relevant in the instant case.

Citytrust administered George's inter vivos trust in precisely the same manner as it administered George's and Myra's estates and testamentary trusts. The common stocks were converted to municipal bonds, solely to maximize income, all of which Citytrust

distributed solely to Alexander from the inception of the trust in 1967 to Alexander's death in 1984, without any regard to petitioners interest as a remainderman. As a result of investing solely in municipal bonds which by their nature could not appreciate to keep up with inflation, the value of the corpus of George's intervivos trust on Alexander's death in 1984 was only $1,442,611.70, a loss of $44,833.90 during the 17 years of Citytrust's administration during which period inflation was 312%, meaning the effective value of the corpus had shrunk by two-thirds (2/3) during this period.

Although George and Myra Ewing appointed Citytrust as their executor and trustee, thus committing their estates and trusts to pay the Bank very substantial fees for the Bank's claimed expertise in such matters, it is undisputed that Citytrust: (a) never undertook to apprise petitioner of his interests and rights in and to any of the estates or trusts; and (b) never attempted to ascertain what petitioner's needs might be; and (c) never attempted to ascertain whether Alexander had any real need for income from the estates and trusts given his inheritance of $2,169,198.00 outright from George and Myra; and (d) never advised petitioner that it was making investment decisions calculated solely

to maximize income, as a result of which there was no possiblity that the value of the corpus could appreciate to keep up with inflation. It is also undisputed that, after commencement of this instant lawsuit, Citytrust changed the manner in which it administered that part of George's inter vivos trust which remained in trust after Alexander's death to balance the competing interests of the new income beneficiary, Lynda Ewing, against those of the new remainderman, her four children, by investing in a portfolio balanced between income producing assets and assets which will appreciate to keep up with inflation.

B. RULINGS BELOW

While recognizing that Connecticut law required Citytrust to balance the competing interests of successive beneficiaries, the District Court held that the grants of discretion in all three instruments were sufficiently broad to relieve Citytrust from the strictures of the prudent investor rule, as a result of which liability could be imposed on Citytrust only if it abused the discretion granted to it. Although the District Court's decision is not entirely clear in this regard, it appears that the grants of discretion on which the District Court relied were the discretion to invade principal (although the District Court failed to note that Myra's testamentary

trust had no such provision) and the discretion "[t]o invest and reinvest without limitation or restriction" (although the District Court failed to note that this was an administrative power and not a dispositive provision of the instruments).

The District Court concluded that Citytrust's admitted policy of administering both estates and all three trusts to maximize income for Alexander's benefit was not an abuse of discretion, even though it precluded any possibility that the assets in the estates and trusts could appreciate to offset the effects of inflation. However, the District Court did hold that Citytrust's invasion of the entire remaining corpus of George's

testamentary trust in February, 1984, was an abuse of discretion for which Citytrust should be surcharged. The District Court reasoned that this was an abuse of discretion because it was done without notice to petitioner required by Connecticut law; because it was for the benefit of Lynda's children, not for the benefit of Alexander or Michael (noting that George's Will made other provisions for Lynda's children); and because the Bank's form for authorization of invasion of principal was not signed by two officers of the Bank as Ciytrusts's own guidelines required and failed to note that petitioner was both an income beneficiary and a remainderman of the trust.

The Court of Appeals affirmed that part of the District Court's decision from which petitioner had appealed on the basis that the instruments in question relieved Citytrust from the strictures of the prudent investor rule, as a result of which Citytrust could be surcharged only if it had abused the discretion given it, which the Court of Appeals held it had not. The Court of Appeals decision herein appealed from never even attempted to specify what terms or provisions of any of the three instruments had the effect of relieving Citytrust from the strictures of the prudent investor rule.

The Court of Appeals overruled that part of the District Court's decision from which Citytrust had appealed on the basis that the meaning of the word "benefit", primarily as interpreted in various tax cases, was so broad that any money given to Alexander is automatically beneficial to him even if it was given to him to enable him to support his adult step-children (Lynda's children who were never adopted by Alexander). Since Alexander "benefitted" from receiving this money, the Court of Appeals held his need or lack of need for it was irrelevant.

REASONS FOR ALLOWANCE OF THE WRIT

A. OVERVIEW

Those of you who are reading this petition are where you are today

because you recognize that the Fifth Amendment's guarantee of due process of law is the Constitutional embodiment of vital principal enunciated by the Founding Fathers that our government must be one of laws and not one of men if it is to maintain legitimacy. As this Court noted in Boddie v. Connecticut, 401 U.S. 371, 374-5, 91 S. Ct. 780, 28 L. Ed. 2d 113 (1971):

> "At its core, the right to due process reflects a fundamental value in our American constitutional system....
>
> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively

> settle their differences in an orderly, predictable manner. Without such a "legal system," social organization and cohesion are virtually impossible.... Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the "state of nature."...
>
> Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle."

This case represnts an extremely disquieting situation which requires the attention and intervention of the

Supreme Court. This Court has ruled many times on the meaning of procedural due process, usually in the context of barriers to access to the court (like Boddie v. Connecticut, supra,) or denial of a hearing at a meaningful stage as in Armstrong v. Manzo, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965) where this Court held that due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner" (emphasis added). Unfortunately, this case will require this Court to rule on when the manner of judicial consideration of a litigant's position becomes so inadequate that it is no longer "meaningful" thus depriving a litigant

of the day in court guaranteed to him by the due process clause of the Fifth Amendment.

The Supreme Court must accept this case to reaffirm the vital principal that failure to follow clearly controlling precedent is a denial of Constitutionally guaranteed right to due process of law. This is not simply a case where an injustice done to an individual litigant needs to be corrected. What we have here is a diversity case where clearly controlling Connecticut case law was cited to the Court of Appeals by petitioner in his Brief and then blatantly and totally disregarded by the Court of Appeals in its decision. It is one thing to overrule precedent

when changing times make it desirable to do so (although many would argue that this should be accomplished only by the legislature and not by the courts). However, the blatant disregard of controlling precedent by the Court of Appeals poses a very real threat to the trust in the fairness of the judicial system which is a necessary prerequisite to its continued functioning in our society. Moreover, in the context of this case, failure to follow precedent is tantamount to breaking a pact society made with George and Myra Ewing, who are now dead and thus unable to complain of this breach of faith, because they certainly executed these instruments in reliance upon the fact that by agreeing to pay

substantial fees to Citytrust for its services in administering their estates and trusts, Citytrust would use its claimed expertise in the administration of estates and trusts to make sure that their wishes as expressed in their Wills and trusts would be interpreted consistently with then controlling Connecticut law.

Petitioner also alleges that his Fifth Amendment due process rights were violated by the Court of Appeals because its decision rests entirely on bases never briefed by either of the parties. It is for this reason that petitioner has taken the unusual step of reprinting in the Separate Appendix hereto the entirety of its Brief and Reply Brief for the Court of Appeals as

well as Citytrust's Brief for the Court of Appeals. If you simply skim through the three Briefs and then read the Court of Appeal's decision, you must conclude that the decision rests on grounds not briefed by the parties. Petitioner recognizes that a court cannot be limited to the issues briefed by the parties. However, petitioner respectfully contends that if a court feels that the parties have not briefed what the court sees as the controlling issues (be they factual or legal) the Supreme Court must make it clear that the fundamental requirement of due process requires the court to request that the parties brief the issues the court sees as controlling.

Finally, this case cries out for the attention of the Supreme Court on a very different level. Petitioner recognizes that the Circuit Courts of Appeal are greatly overburdened both by the ever increasing flood tide of drug-related criminal appeals (prosecuted by defendants with ample financial assets to vigorously pursue their appeals) and by vacancies in the Circuit appellate panels caused by vagaries of the appointment process and the currently inadequate judicial salaries. Based on remarks made by Judge Van Graafeiland during oral argument, it would seem that this situation has created a resentment by the Court of Appeals to the burden imposed by diversity cases, such as the

instant case, which, by their very nature could have been brought in state court. Nevertheless, if, as petitioner alleges, the Court of Appeals did not even have the time to read the Briefs of the parties, this amounts to such a departure from the accepted and usual course of judicial proceedings as would call for an exercise of the Supreme Court's power of supervision. While the pros and cons of utilizing limited federal judicial resources for cases based on diversity jurisdiction can certainly be vigorously debated, so long as the law continues to permit this jurisdictional basis, litigants ought not be punished by the courts for invoking it.

This case represents the ideal vehicle for the Supreme Court to lay down some guidelines for the Circuit Courts of Appeal to follow in prioritizing pending appeals because in this case neither party would have been significantly prejudiced by a longer delay in hearing the appeal. A justifiable desire to quickly dispose of appeals in cases where any significant delay is prejudicial to the rights of a party, as in criminal appeals where the appellant is usually incarcerated pending the appeal, should not serve to deny a full and fair hearing to those litigants who would not be materially prejudiced by delay in hearing their appeals.

B. PETITIONER'S APPEAL - DUTY TO BALANCE

This is not a complex case. Citytrust does not deny that, by investing solely in municipal bonds to maximize tax-free income for Alexander, it in effect precluded any possibility that the corpus of the estates and trusts would appreciate sufficiently to keep up with inflation, as a result of which the value of the corpus of the estates and trusts declined by more than two-thirds during Citytrust's 17 year stewardship. Citytrust and the District Court have both acknowledged that Connecticut law requires a fiduciary, in making investment decisions for an estate or a trust, to

balance the necessarily competing interests of the income beneficiaries in maximizing production of income against those of the remaindermen in preserving the value of the corpus. The reason this case was ripe for summary judgment is because Citytrust never contended that it tried to balance these competing interests in making investment decisions for the estates and trusts here at issue. Instead, Citytrust simply contended, that the discretion accorded to it in the three instruments was so broad that its only duty in making investment decisions for the estates and trusts was not to abuse this discretion. It did so without ever, at any stage in the proceedings below, pointing to any

language in any of the three instruments as giving it such discretion.

Both parties also acknowledge that Connecticut law permits a fiduciary to be relieved of the duty to balance these competing interests by the terms of the instrument. The only substantive question presented by this case is whether any language in any of the three instruments here at issue relieved Citytrust of this balancing obligation. Because it never acknowledged that Connecticut law required a fiduciary to balance the competing interests of successive beneficiares, the Court of Appeals never even reached this issue which is clearly the focal point of this case

and was extensively briefed for the Court of Appeals by petitioner.

Instead of discharging its judicial obligation to properly analyze this issue, the Court of Appeals treats this entire case as one where a beneficiary argues that if the fiduciary had made better investment decisions, he would have inherited more:

> "Although Michael argues that Citytrust should have followed a different investment strategy to better serve his interests as the remainderman of various trust assets, the district court correctly held that George's will did not require it to do so."

Since petitioner's briefs to the Court of Appeals make it abundantly clear that this is <u>not</u> the gravamen of petitioner's complaint, one can only

conclude that the Judges on the Court of Appeals panel did not burden themselves with reading petitioner's Brief. This court must hold that lower courts have an absolute obligation to make it clear in their opinions that they have considered the arguments advanced by the parties, however briefly and even if only to indicate a rejection thereof. An opinion which totally fails to give any indication that a party's position was even considered by the court effectively denies the litigant his day in court.

Apparently because of the aforementioned misconception of the nature of petitioner's claim, the Court of Appeals never even reached in its opinion the primary issue of whether or

not language in any or all of the three instruments relieved Citytrust of its obligation to balance the competing interests of the successive beneficiaries. Instead, the Court of Appeals simply observes:

> "Both in its capacity as executor and trustee, Citytrust owed Michael a fiduciary obligation. See Satti v. Rago, 186 Conn. 360, 367 (1982); O'Connor v. Chiascione, 130 Conn. 304, 307-08 (1943); 45 Conn. Gen. Stat. Ann. § 45-100d(a) (West Supp. 1989). Connecticut law generally requires that a fiduciary such as Citytrust act with the care of a prudent investor in managing estate assets. United States Trust co. v. Bohart, 197 Conn. 34, 48 (1985); see also Jackson v. Conland, 178 Conn. 52, 55 & n.3 (1979); Conn. Gen. Stat. Ann. § 45-88 (West Suppl. 1989)."

If the Court of Appeals had bothered to read petitioner's Brief, it would have realized that this observation is totally meaningless in the context of this case. Petitioner's claim has absolutely nothing to do with any alleged violation of the prudent investor rule by Citytrust. The Court of Appeals has analyzed this case as if the only duty owed by a fiduciary to beneficiaries under Connecticut law was to follow the prudent investor rule. This is clearly not the law in Connecticut or in any other jurisdiction of which petitioner is aware. To the contrary, in Connecticut, as in all other jurisidctions of which petitioner is

aware, a fiduciary owes beneficiaries a number of duties, such as the duty not to delegate, the duty to avoid self-dealing, the duty of loyalty, and the duty to balance the competing interests of successive beneficiaries. See, for example, Restatement (Second), 1 Trusts § 169 through 185 which catalogs seventeen (17) separate duties of a trustee without ever suggesting that they are all subcategories of the duty to act as a prudent investor. In fact the duty to make prudent investment decisions is in a different section in the Restatement (§227) from the more general duty to act as a prudent man in administering the trust (§ 174) and in comment (y) to Section 227 the Restatement explicitly notes that:

> "[a]n investment which would not otherwise be improper as a trust investment is improper where the trust is created for successive beneficiaries if the investment would be unduly favorable to one beneficiary at the expense of the other. See §232."

In considering proper trust investments, §232 states: "If a trust is created for beneficiaries in succession, the trustee is under a duty to the successive beneficiaries to act with due regard to their respective interests."

While these various duties are often collectively referred to as a "fiduciary duty", each duty is independent of the other. While a testator (of a testamentary trust) or a settlor (of an intervivos trust) can

waive any or all of these duties, waiver of one duty is no way effects a waiver of any other duty. What the Court of Appeals has done in this case, in effect, is to hold that waiver of the prudent investor rule has the effect of waiving the duty to balance the competing interests of successive beneficiaries. This holding directly contravenes the holding of the leading Connecticut cases of Connor v. Hart, 157 Conn. 265, 253 A.2d 9 (1968) and Gimbel v. Bernard F. and Alva B. Gimbel Foundation, Inc., 166 Conn. 21. 347 A.2d 81 (1974).

The two cases relied upon by the Court of Appeals, Jackson v. Conland, 178 Conn. 52, 420 A.2d 898 (1979) and United States Trust Co. v. Bohart, 197

Conn. 34, 495 A.2d 1034 (1985) are both inapposite. In both of these cases, the plaintiffs allege that investment decisions made by the trustees violated the Connecticut prudent investor rule and in both cases the Connecticut Supreme Court held that language in the instruments evidenced a clear intent by the settlor to release the trustee from the strictures of the prudent investor rule. Neither of these cases concerns the separate duty imposed by Connecticut law on fiduciaries to balance the necessarily competing interests of successive beneficiaries.

In sharp contrast, the two leading cases relied upon by petitioner in its Brief for the Court of Appeals, Connor v. Hart, supra, and Gimbel v. Bernard

F. and Alva B. Gimbel Foundation, Inc., supra, are both directly on point with the instant case. The key issue in both of these cases is whether or not language in the instruments which admittedly relieves the trustee from the strictures of the prudent investor rule has the effect of also relieving the trustee from the duty to balance the necessarily competing interests of successive beneficiaries:

> "It certainly would constitute a violent and wholly unwarranted repudiation and reversal of heretofore settled Connecticut trust law to construe any or all of these administrative powers conferred on the trustees as powers which, separately or collectively, authorized the trustees to destroy or cripple a charitable bequest.... For the trustee so to do would be an impermissible and illegal

> abuse of discretion and would obviously be in violation of the settled rule that "[w]hen there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them." Restatement (Second), 1 Trusts 183."

Connor v. Hart, 157 Conn. 265, 276 (1968).

In Gimbel, the court first notes enormous breadth of discretion accorded to the trustee in the administrative powers provisions of the instrument there in issue, a breadth of discretion which far exceeds that granted to Citytrust in any of the three instruments here at issue:

> "In contrast to the simplicity of these [dispositive] provisions, the thirteenth article of the will set forth in twenty-three paragraphs a detailed specification of

> rights, powers and authority granted to the trustees "in furtherance and not in limitation or restriction of those conferred upon them by law." The settlor expressly provided that any or all of these powers might be exercised by the trustees "in whole or in part, at any time or times and from time to time, in their sole, absolute and uncontrolled discretion, in such manner as they deem advisable, without liability and without the necessity of obtaining any order or the approval of any court."

Gimbel, supra, at 26-27.

The question the executors and trustees posed to the Gimbel court was:

> "D. May the executors and trustees exercise the powers, authorities and discretions conferred upon them by the Will in such a manner as to alter substantially the value of the respective interests of the income beneficiary and the remainderman (1) in oil and gas property interests; (2) in the estate and trust assets, other than oil and gas property interests."

Gimbel, supra, at 27-28.

In deciding how to answer this question, the Gimbel Court noted:

> "Although the settlor imparted to the trustees the widest possible discretion, they are, nonetheless, under a duty to deal impartially with the successive beneficiaries. Connor v. Hart, 157 Conn. 265, 277, 253 A.2d 9; Restatement (Second), 1 Trusts §§183, 232. "[T]the interests of the two beneficiaries are to a certain extent antagonistic, and the trustee is under a duty so to administer the trust as to preserve a fair balance between them." 3 Scott, Trusts (3d Ed.) §232."

Gimbel, supra, at 34-35.

The answer the Gimbel court came to supports only the petitioner's position herein:

> "While both the settlor's will in article thirteenth both greatly enlarges the

> administrative powers of the trustees and insulates them from liability for the exercise of those powers, they have been given no dispositive, as distinguished from administrative, powers and there is nothing in the will which would allow the executors and trustees to exercise any of their administrative powers to alter substantially the value of the respective interests of the income beneficiary and the remainderman either in the oil and gas interests or the other trust assets. Our answer to questions B (5), C and D is "No."" (emphasis added)

Gimbel, supra, at 35-36.

After failing to acknowledge that under Connecticut law a fiduciary owes beneficiaries not only the duty to act as a prudent investor but also the duty to balance the competing interests of successive beneficiaries, the Court of Appeals then observes that:

> "Language in a will or a trust agreement, however, may excuse such a fiduciary from the strictures of this [prudent investor] rule and allow it a broader range of investment discretion than the rule otherwise would permit. [cases cited]"

While neither party ever disputed the validity of this general principal of Connecticut law, the Court of Appeals, in its decision, never points to what language in any of the three instruments it believes "excuse[s] a fiduciary from the strictures of this rule". In failing to point to any specific language in any of the three instruments which has the effect of relieving Citytrust from its duty to balance the competing interests of the successive beneficiaries, the Court of

Appeals has failed to properly discharge its judicial function, thus effectively denying petitioner his day in court in violation of his Fifth Amendment due process rights.

Although the District Court relied to some extent on Citytrust's power to invade principal, neither its decision nor that of the Court of Appeals gives any effect to the fact that Myra's testamentary trust had no provision permitting invasion of the corpus. For this reason, one can only conclude that the Court of Appeals has relied on the language in the administrative powers provisions of all three instruments giving Citytrust the power "[t]o invest and reinvest without limitation or restriction". If this is indeed the

basis upon which the Court of Appeals concluded that Citytrust had been relieved from the duty to balance the competing interests of the successive beneficiaries, it is directly in conflict with the clear holdings in the cases of Connor v. Hart, supra, and Gimbel v. Bernard F. and Alva B. Gimbel Foundation, Inc., supra, which were discussed hereinabove. The failure of the Court of Appeals decision to even consider, let alone distinguish, the holdings in these two cases, which were discussed extensively in petitioner's Brief for the Court of Appeals, can only lead to the conclusion that the Court of Appeals failed to read petitioner's Brief to it, thus effectively denying him his day in

court in violation of his Fifth Amendment due process rights.

Although petitioner, in his Brief to the Court of Appeals, vigorously contested whether any language in any of the three instruments effectively waived application of the prudent investor rule, the Court of Appeals decision gives absolutely no indication that any of petitioner's arguments on this issue were even considered. The Court of Appeals then compounds this error by totally failing to address petitioner's contention that under Connecticut law the duties imposed by the prudent investor rule on the one hand and the duty to balance competing interests of successive beneficiaries on the other hand are independent

duties imposed on a fiduciary so that waiver of one duty in no way effects a waiver of the other. The Court of Appeals failure to address this issue effectively denied the petitioner his day in court, thus depriving him of his Fifth Amendment due process rights.

The Court of Appeals then concludes, in dismissing petitioner's appeal:

> "In such circumstances, courts may hold the fiduciary liabile only where it abuses that discretion.... Michael has made no showing that Citytrust acted dishonestly, in bad faith, with improper motives, or in a grossly negligent manner in following a conservative investment policy emphasizing income over capital gains. We accordingly find, as did the court below, that Citytrust did not abuse its discretion in following the investment

strategy of which Michael now complains."

Even though petitioner contends the relevant issue is not abuse of discretion because Citytrust was accorded no discretion in any of the three instruments to ignore the duty imposed upon it to balance the competing interest of successive beneficiaries, in its Brief for the Court of Appeals, petitioner devoted six (6) pages to arguing that if Citytrust in fact had such discretion, its exercise thereof was abusive in numerous specific manners fully supported by the record in the case. Even though Citytrust never even attempted to rebut any of these arguments in its Brief for the Court of

Appeals, the Court of Appeals again never even acknowledged petitioner's arguments in this regard, thus again depriving petitioner of his day in court.

The allegations of abuse of discretion, fully detailed by petitioner in his Brief for the Court of Appeals, fully supported by the record in the case, and never rebutted in any way by Citytrust, are as follows. First, there is the conversion of all of the assets in both estates to a portfolio consisting solely of municipal bonds within two months after the deaths of both Myra and George. The reason municipal bonds, which can never appreciate to keep up with the effects of inflation,

were the preferred asset is because Alexander had inherited so much money outright from Myra and George that he was in a very high tax bracket. This leads us to the second instance of abuse of discretion by Citytrust, its failure to even allege that it ever ascertained that Alexander had any need for such income. In fact, investment of the corpus of both estates and all three trusts in municipal bonds demonstrates conclusively that Citytrust was well aware of Alexander's substantial wealth and consequent high taxable income.

The third instance of alleged abuse of discretion lies in the losses incurred by Citytrust in trading municipal bonds for Myra's estate in

the amount of $103,577.34. Such loss was never denied by Citytrust. The fourth instance of alleged abuse of discretion by the Bank lies in its failure to ever apprise petitioner of his rights and interests in and to the estates and trusts and its failure to ever attempt to ascertain petitioner's financial needs at any time during the Bank's 17 year stewardship of the estates and trusts.

The fifth and most important area of abuse of discretion is Citytrust's failure to follow its own internal investment policy guidelines which clearly require the Bank to balance the competing interests of successive beneficiaries and clearly require investment in a diversified portfolio

of assets to achieve a proper balance between production of income and preservation of the corpus. How can the Court of Appeals simply ignore the fact that Citytrust violated its own internal guidelines in the investment policy it followed for these estates and trusts?

In light of the foregoing, the conclusion of the Court of Appeals that petitioner "has made no showing that Citytrust acted dishonestly, in bad faith, with improper motives, or in a grossly negligent manner" in the investment policy which it followed can only be taken as further evidence that the Court of Appeals never even read petitioner's Brief to it on the issue of abuse of discretion. Petitioner's

allegations of abuse of discretion certainly show at least bad faith and gross negligence even if they do not show any actual dishonesty or improper motivation. This Court must hold that failure of the Court of Appeals to address the issue of abuse of discretion effectively denies petitioner his day in Court thus depriving him of his Fifth Amendment due process rights.

C. CITYTRUST'S APPEAL

In considering the monetary award made to petitioner by the District Court, the part of the Court of Appeals decision which overrules the District Court entirely ignores what both

parties and the District Court thought was the only issue relevant to this part of petitioner's claim against Citytrust, namely, whether or not the February, 1984, invasion of principal was an abuse of the discretion expressly accorded by George's Will to invade principal. In doing so, the Court of Appeals totally ignored the Briefs filed on this issue by both parties thus again effectively denying petitioner his day in court in violation of his Fifth Amendment due process rights.

The Court of Appeals decision cites: (a) a variety of cases from other jurisdictions (after noting that the Erie-Tompkins doctrine requires it to apply Connecticut law to this case);

and (b) an old Connecticut case, Ferrigino v. Keasbey, 93 Conn. 445 (1919) and Connecticut statutory law, §46(b)-37, which both deal with "benefits" for spouses in the context of divorce; and (c) two Connecticut cases involving gifts made for a party's "benefit" (Ferrigno v. Keasbey, 93 Conn. 445 (1919) and Dei Cas v. Mayfield, 199 Conn. 569 (1986); and (d) various tax litigation cases to arrive at a definition of benefit which is so broad the very issue of abuse of discretion is eliminated.

This is totally at variance with well established Connecticut law that no grant of discretion will be deemed to be so broad that an exercise thereof cannot be reviewed by the Courts for

reasonableness. See Gimbel v. Bernard F. and Alba B. Gimbel Foundation, Inc., supra, at 34-35:

> "In the Connor case, we stated (p. 274): "Although the use of the term 'sole discretion' confers a wide discretion, no language in a trust will be so construed as to remove a trustee from equitable control. 'To the extent to which the trustees had discretion, the court will not attempt to control their exercise of it as long as they have not abused it.... But the law will not tolerate its abuse, however great the creater of the trust intended the grant of discretion to be.' Conway v. Emeny,...[139 Conn. 612, 619, 96 A.2d 221]. This rule applies even when the will has used the term 'absolute' or 'sole' discretion. Ibid. The same rule is recognized in Connecticut Bank & Trust Co. v. Lyman, 148 Conn. 273, 281, 170 A.2d 130."

Gimbel, supra, at 34-35.

The strained definition of "benefit" which the Court of Appeals uses to overrule the District Court in this aspect of the case totally removes Citytrust from any equitable control whatsoever in its exercise of its explicit discretion granted by George's Will to invade principal, a result which is totally at variance with well established Connecticut law cited to the court by petitioner in his Brief.

If the Court of Appeals believed that the decision of the District Court did not apply the legally proper definition of the word "benefit" in the context of the instrument here at issue, it should have requested both parties to submit briefs to it

addressing this point instead of expending such substantial effort to overrule the District Court on grounds never advanced by Citytrust.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant the Writ of Certiorari.

Respectfully submitted,
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